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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

## No. 398.

C. A. RANDOLPH,
*Petitioner,*

vs.

THE MISSOURI BAR ADVISORY COMMITTEE,
*Respondent.*

**REPLY BRIEF OF PETITIONER TO RESPONDENT'S BRIEF OPPOSING ISSUANCE OF WRIT OF CERTIORARI.**

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**FOREWORD.**

In this reply we will attempt to follow as near as possible the chronological order used by Respondent in the treatment of the several points in its brief opposing issuance of a Writ of Certiorari.

## ARGUMENT.

### I. Due Process and Rule 5.03.

On pages 6 and 7 of Respondent's Reply Brief, it is asserted that Petitioner is complaining of lack of due process in receiving in evidence as depositions the former testimony, given both *ex parte* and at formal hearings, of witnesses Jarboe, Smith, Carignan, and Tuggle, without objection on his part at the time. On the contrary Petitioner claims that he was denied due process in connection with this testimony in that the Special Commissioner expressly stated in his report, which the court below accepted, approved, and followed, that he would accept as proving Petitioner's guilt the testimony given by these witnesses in a secret, *ex parte* hearing where Petitioner was not present, but that he would reject *in toto* the testimony given by these same witnesses on cross-examination many months after such *ex parte* testimony, wherein some of said witnesses testified that they had been mistaken in their previous testimony and gave testimony absolving Petitioner of all guilt, and others who had formerly given testimony adverse to Petitioner were so thoroughly impeached as to destroy their previous adverse testimony (Pet. pp. 6, 44-52, 72-73, 92-93, 96, 97-102, 117). Petitioner contends such procedure resulted in a denial of due process in that it deprived him of all benefits flowing from his right to the assistance of counsel, right to face his accusers, right of cross-examination and to his day in court. (Pet. pp. 97 to 103 and cases cited).

How disastrous this action of the Court and Special Commissioner was to Petitioner will readily be appreciated when it is considered that the contention of the prosecution was centered almost entirely upon the theory that the

several clients whose cases are involved in the charges contracted generally with Petitioner to handle their cases for the larger fee recited in the contracts and without reference to or discussion of any separation of the investigative aspects from the legal aspects; that the client did not employ an investigator or know that an investigator was involved in his case; that no investigative service was performed by anyone other than the Petitioner and the client, and that the client did not pay any investigator or know that any investigator in his case had been paid. In fact, in an abortive attempt to prove this contention the prosecution called Petitioner as a witness at the outset of the hearings before the Special Commissioner to testify concerning all the dealings he had with the respective clients and their investigators, to tell all the investigative work of the investigators that came to his attention and to produce all statements, correspondence, photographs and other investigative data contained in his files. His testimony on this subject covered the greater part of the hearings in December, 1957, January and March, 1958, which testimony is contained in Vols. 1, 2, 4 and 5 of the record herein, extending over close to 1,000 pages of the record and several hundred exhibits. Thus for the Court to find that this contention of the prosecution was proved by the *ex parte* testimony of these four witnesses, unaffected by their testimony on cross-examination which destroyed all probative value of their previous testimony, was tantamount to finding him guilty of these and all the other counts in the Information and totally disregarding the countervailing testimony not only of Petitioner himself but of a large number of his former clients who appeared and testified.

Respondent first attempts to avoid the full impact of this clear denial of Petitioner's day in court as to said four witnesses (Jarboe, Smith, Carignan and Tuggle) by the Special Commissioner (Comm. Rep. 180, 199) and later

by the Missouri Supreme Court in adopting the Report (Pet. pp. A43, A56), "The Special Commissioner was very charitable to respondent in the findings of facts * * *" (Pet. p. A58), by describing Petitioner's complaint as not knowing "how the Court was going to construe the testimony" (Resp. Br. p. 7) and "because the Court did not draw the inferences therefrom Petitioner desired" (Resp. Br. p. 8). Then it is contended, "In Missouri the report of the Special Commissioner is advisory only" (Resp. Br. p. 9). But when the Court adopted and approved its Special Commissioner's Report *in toto* (Opinion pp. 24, 36, 38, Exhibit B pp. A43, A56, A58) it also necessarily adopted each and every part not specifically reserved or excluded, including, "the Commissioner finds that there is more probative value in her (Mrs. Jarboe's) original testimony than in her testimony on cross-examination, after her schooling" (Comm. Rep. p. 180), and "* * * witnesses when originally testifying from their own recollection, stated one version of the occurrences and then, later on, after having their memories refreshed, testified to a diametrically opposite state of facts." (Comm. Rep. p. 199).

Moreover, the Court's opinion shows conclusively that it deliberately excluded and disregarded the testimony of these witnesses on cross-examination, as did its Commissioner, as completely as if they had not testified on cross-examination at all. Thus, the court convicts Petitioner on the Tuggle count based upon Tuggle's testimony quoted Exhibit B pp. A34 to A36 in the opinion. This testimony was given *ex parte* when Petitioner was not present and was offered by the prosecution (4-825). The quoted testimony is found at 4-828 to 829, 830, 830-831. He was not cross-examined until seven months later (4-846 to 950) when he was thoroughly impeached and discredited. For a summary of such evidence in its entirety see Pet. pp.

48-52. The court makes no reference in the opinion to the evidence elicited on cross-examination.

Similarly, the Court (Pet. A38-A40) quoted only from the *ex parte* testimony of Carignan (4-725, 726, 727, 730-731, 737). Incidentally the Court deleted (Pet. A38) from the quotation: "Mr. Hemker: Let me interrupt you. Had you asked Pat Tuggle to send Smith to you? The Witness: I don't recall whether I had asked him to send Smith to me, but we had discussed * * *" (4-726). This admission alone of the witness, as omitted from his quoted testimony would seem effectually to negate any concept of solicitation in the Carignan case. *In re Sizer*, 306 Mo. 356, 267 S.W. 922, 928, 929. The Court likewise wholly ignored his testimony on cross-examination seven months later when he admitted the understanding that he was to pay Petitioner a fee of 40% if the latter stood the expense of the investigation but only 30% if Carignan stood this expense, and virtually admitted the other essentials testified to by Petitioner and Smith, the investigator, and was otherwise completely discredited (4-748 to 825). See also the Summary of this testimony in its entirety (Pet. A. 44-48).

It is interesting to note that the Respondent also here takes its cue from the Special Commissioner and the Missouri Supreme Court and treats as the settled facts of the case the witnesses' testimony at the *ex parte* hearing and ignores the later testimony on cross-examination where the witness repudiated such *ex parte* testimony.

Thus, it is stated (Resp. Br. p. 11) that "O. C. Brown transported Mrs. Jarboe to McDonald's office * * * and then direct to Petitioner's office in Kansas City * * *". Mrs. Jarboe's *ex parte* testimony, given eight years after she employed Petitioner, is in Vol. 4, pp. 950-978, and her later

testimony on cross-examination, Vol. 4-978 to 1018. Her testimony *ex parte* was vaccilating as to whether or not Brown acompanied her and her sister-in-law to Petitioner's office after McDonald had referred her to Petitioner with a letter of introduction from him, saying that her recollection was not clear (4-962), although she also said she and her sister-in-law after returning from Minneapolis "immediately within a few days went up to talk to Mr. Randolph" (4-956). However, on her later cross-examination, after refreshing her recollection, she definitely denied that Brown accompanied them to see Petitioner (4-999, 990).

Respondent, p. 8 of its Reply Brief, points to Petitioner's offer to submit the case upon the record made before the Advisory Committee in lieu of calling his clients to testify, as indicating his satisfaction with such testimony and his prior treatment. In the first place, it must be remembered that the Information charged Petitioner with improper conduct in handling the cases of some 27 different clients over a period of 6 to 13 years previously. These former clients were scattered over the west half of the United States. To track them down and bring to Missouri such of them as he could persuade to come, or arrange to take their testimony at their widely separated places of residence, would have cost Petitioner many thousands of dollars. He did not have at his disposal the facilities of the Association of American Railroads, including the Santa Fe and Hinkle, its claim agent, enjoyed by Mr. Thompson (11-2884, 2888, 2923) and Mr. Barrick (11-2725), the counsel and special investigator respectively of the Court's Advisory Committee. When this offer was denied he did at great expense locate and bring to Missouri to testify, in addition to those living in Missouri and Kansas, E. E. Jennings and Oscar Brinker from Texas, Dunham from Colorado, Hunnicutt, Thomas, Mears and Beck, from New Mexico, and Goodner from California.

In the second place (relying on the fair consideration of the evidence under the established rules of evidence), he was satisfied with the testimony of the witnesses he had called, and with the cross-examinations of such as had testified to anything of an adverse character. Besides, he had no reason then to anticipate that the Commissioner and Court would rule out and refuse to consider the testimony such witnesses gave on cross-examination, and in the third place the former testimony of witnesses, if offered, would have been received in evidence by the Special Commissioner anyway. *In re Warden*, 146 S.W.2d 874. Please see discussion of this subject on pages 97 to 103 of our Petition for Certiorari.

On page 8 of Respondents' Reply to our Petition they seek to make capital of the fact we did not set out in the appendix to our Petition a copy of Petitioner's written answer to the information filed in the Missouri Supreme Court.

The answer is set out verbatim in the abstract of record of the proceedings in the Missouri Supreme Court certified by the clerk of the Missouri Supreme Court and filed by us herein with the transcript of the testimony. Not only is such certified copy of the answer already before this Court but the Special Commissioner properly described it on page 2 of his printed report where he said: "On November 23, 1956, Randolph's answer was filed, denying the charges of the information."

On page 9 of Respondents' Reply to our Petition herein it is asserted:

> "The Appendix to the petition shows on its face the Petitioner did not attempt to raise any such question (Constitutional) until in briefs filed after the evidence was in and the case decided."

Respondents are clearly in error in making such statement.

On pages A74 to A82 of the Appendix we quoted, from our briefs filed with the Commissioner during the proceedings and before the preparation of his report, the exact words by which we raised the Constitutional questions beginning with our typewritten brief before the Commissioner after the evidence was in but before he prepared his report, the Commissioner's recommendations on the Constitutional questions in his Report making his recommendations to the Court, and in our printed brief filed in the Missouri Supreme Court prior to oral argument and submission to the Court for decision. Certainly that all occurred before the case was "decided" unless Respondents consider the case was "decided" as soon as the evidence was in and before briefs were filed either before the Commissioner or the Missouri Supreme Court. We labored under the impression the case would not be decided until the opinion and judgment of the Missouri Supreme Court was filed.

Respondents charge on page 9 of their Reply Brief herein that "no constitutional question was ever timely raised." We have already pointed out how it was raised before the Commissioner prior to his report and before the Missouri Supreme Court prior to its decision.

In Petitioner's brief filed in the Missouri Supreme Court prior to oral argument and submission Constitutional questions were again raised (Appendix to Petition herein pages A77 to A82). On page 2 of the typewritten Opinion of the Missouri Supreme Court (Appendix p. A19) the Court specifically recognized the briefs before it as properly raising the exceptions of the respective parties to the Commissioner's Report.

This Court has held in a Missouri case that Constitutional questions raised for the first time in the exceptions to the report of a Special Commissioner, as here, are timely raised. *International Harvester Co.* v. *State of Missouri*, 234 U.S. 199, 34 S. Ct. 859, 58 L. Ed. 1278.

Meritorious Constitutional questions may even be raised for the first time in this Court. *Urie* v. *Thompson*, 337 U.S. 163, 60 S. Ct. 1018, 93 L. Ed. 1282.

In the Petition herein at page 42 we pointed out that the decision and judgment of the Missouri Supreme Court necessarily overruled our Constitutional questions. Respondents have not denied that if properly raised the opinion and judgment of the Missouri Supreme Court did have the necessary effect of overruling such Constitutional questions.

This court looks to the question of whether or not the highest court of the state, either in the case sought to be reviewed or in some prior case, has upheld the state statute or other state action, or was afforded an opportunity so to do, against the attack made under the Federal Constitution. *Anonymous Nos. 6 and 7* v. *Baker*, 360 U.S. 287, 290, 79 S. Ct. 1157, 1159. We have pointed out that the highest Missouri Court, both were afforded an opportunity to pass upon the validity of Missouri laws and Rules and Missouri action against the attacks here made under the Federal Constitution, and that the Court necessarily upheld the same against the attacks we here make. In addition, the Missouri Supreme Court has heretofore, in several different disbarment proceedings, upheld the validity of these laws, rules and such state action against similar attacks under both the Federal Constitution and the Missouri Constitution. *In re Sparrow*, 90 S.W.2d 401; *Hulse* v. *Criger*, 363 Mo. 26, 247 S.W.2d 855, 858; *Leimer* v. *Hulse*, 178 S.W.2d 338, 339.

**II. Impeachment Testimony Treated As Substantive Testimony Against Petitioner.**

Respondent, p. 9, of its Reply Brief herein attempts to answer only one of the several respects set forth in the Petition for Certiorari herein in which the Missouri Court violated the rules of evidence in order to convict Petitioner (Pet. pp. 6-8, 87, 89-91, 92, 93, 96, 97-98), to wit, that the Court and its Special Commissioner treated the impeaching evidence of witnesses Feezer and Barrick as to what they testified Petitioner's witnesses Mears, Beck and Goodner said to them out of Court as original and substantive evidence of the truth of such supposed statements and as direct proof of Petitioner's guilt. Counsel contends this testimony was considered below only to impeach the credibility of these witnesses and not as binding on Petitioner. A few of the instances supporting Petitioner's contention in this regard will suffice. The Special Commissioner found,

> "* * * that Fenn was soliciting these cases is supported by Mears' statement to Mr. Feezer * * * that Fenn came to the hospital and solicited his case for McDonald and got Mears to write a letter of employment to McDonald and, that his first contact with Respondent (Petitioner) was after McDonald's office returned Mears' file to Fenn. The Commissioner concludes that, if Mears' statement to Feezer * * * was true, Fenn contacted Respondent about Mears' case" (Comm. Rep. 155).

Also:

> "Feezer's * * * testimony that Mears told him * * * that Fenn was paid for recommending a lawyer and that Fenn frequently did that, is consistent with these views * * * and when McDonald's office declined to proceed with the case Fenn influenced Mears to contact Respondent" (Comm. Rep. 155).

Again:

> "* * * and there is the direct evidence of Mr. Feezer's testimony that Mears told him that Fenn had little to do with the investigation of his case; the Commissioner finds that Fenn was paid for obtaining the Mears' case for Respondent * * *" (Comm. Rep. 163).

Further:

> "The Commissioner does not believe Goodner employed Fenn for what Respondent would knock off his fee * * * Goodner's statement to Mr. Barrick that Fenn was paid less than $500 and that no cashier's check for Fenn was purchased * * * is of more weight * * *" etc. (Comm. Rep. 174).

And:

> "It is therefore felt that such statements as those of Mears to * * * Feezer * * * were admissible for * * * impeachment of Mears as well as in connection with their hearing upon the conduct of Respondent." (Comm. Rep. 206).

Now, Petitioner excepted specifically to these findings of the Special Commissioner and assigned error thereon in his brief before the Missouri Supreme Court, (Brief, pp. 67, 88 *et seq.* (Petition herein, Exhibit F, pp. A74 to A82)). But the Court in all things approved, adopted, and made said Report its own in the opinion. Thus, the Court said:

> "The findings of the Commissioner are fully supported by the evidence" (Pet. p. A43).

And:

> "An examination of the record in the case before us and the report of the Special Commissioner has

led us to the conclusion that the Commissioner was extremely charitable in his findings of facts * * *" (Pet. p. A56).

"as we have said supra, the Special Commissioner was very charitable to respondent in the findings of facts * * *" (Pet. p. A58).

Respondent, p. 10 of its Reply Brief herein, points to the Court's opinion (Pet. Exhibit B, pp. A53-A55) as indicating the Court limited the effect of the above testimony to impeachment. But there is nothing in what the Court said to indicate an intention so to limit this testimony. In view of what the Court said above without any qualification, both before and after the part of the opinion relied upon by Respondent, it is clear the Court, like its Commissioner, treated this testimony as substantive proof of Petitioner's guilt. Otherwise, in view of Petitioner's vigorous attack upon the Commissioner's finding of guilt based upon this impeaching evidence, the Court would have expressly limited such evidence to impeachment.

That the Court had no intention of so applying the rules of evidence to this testimony conclusively appears from its similar approval and refusal to strike down other and further violations of the rules of evidence by the Commissioner so vigorously excepted to and assailed in Petitioner's brief and motion for acquittal or for Rehearing in the Missouri Court on Missouri and Federal Constitutional grounds (Pet. pp. 9, 10, A64, A65, A70, A72, A80. A81). These violations of the rules of evidence by the Commissioner in his Report and adopted by the Court are referred to and set forth in the Petition herein among the Questions Presented, pp. 6, 7 and 8, and discussed with page references to record, Report and Opinion, pp. 92, 93, 96, 97, 98 and 106, and will not be repeated here.

These other and further violations of the rules of evidence and consequent constitutional infringements Respondent sees fit to ignore entirely.

Additionally, when it is considered that the Court expressly convicted Petitioner on a charge (Pet. pp. 7, 103 —permitting his clients to contract with lay investigators on a contingent basis) not contained in the Information, on which he was never tried, which theretofore had not only never been held by a Missouri Court to be improper but had been expressly made permissible by a Missouri Statute and had by the same Court been held to be proper (Pet. pp. A55-A56, 103-105); and when Missouri disbarment cases are examined, particularly Pate (119 S.W.2d 11, 24), Conner (207 S.W.2d 492, 496), and Sparrow (90 S.W.2d 401, 404), it is readily apparent that the Court was saying that the rules of evidence were being discarded and disregarded because not by the Court "deemed appropriate to disbarment" (*In re Conner*, 207 S.W.2d l.c. 496). The Court specifically cites and relies on the Conner case (Pet. pp. A20, A57). For a fuller discussion of the Missouri Court's disregard for the rules of evidence in this and other disbarment cases, in violation of the Missouri Constitution, a Missouri Statute and its own Rule 5, relating to disbarment proceedings, see Petition, pp. 89-106.

Realizing that serious constitutional infringements inhere in the Commissioner's findings in the above matters, Respondent now seeks to repudiate him and insulate his findings from the Court's opinion and judgment in this case. Thus, at p. 9, of its Reply Brief, it said "* * * the report of the Special Commissioner is advisory only", and that the writ sought herein is directed "to the opinion of the Missouri Supreme Court * * * not to the Commissioner's findings". This, of course, would be true if the Court had seen fit to disavow such findings. This the Court did not

do, but in all things approved and adopted them as its own findings, (Opinion, Petition Exhibit B, pp. A43, A56, A58) as demonstrated above. The Court disagreed with its Commissioner in one important respect only and that was that Petitioner should be permanently disbarred instead of given a suspension for one year, recommended by him. Respondent here, acting as Informants below, made a different contention in their principal brief before the Missouri Court. They said, p. 6, in that Brief:

> "Any argument Informants would make, like the Statement of Facts, *would be mere repetition of the findings and conclusions of the Commissioner.*" (Emphasis supplied.)

Having supported these findings of the Commissioner and pursuaded the Court to embrace, approve, adopt and reiterate them, it comes with poor grace indeed for Respondent now to abandon him and repudiate him.

**III. Quantum of Proof.**

On pages 10 and 11 of Respondents' Reply to our Petition it is charged that Petitioner asserted that the Opinion of the Missouri Supreme Court was based on the testimony of three witnesses; Tuggle, Carignan and Deason.

The record does not support that statement. We made no such statement. We referred to page 12 of the typewritten opinion of the Missouri Supreme Court where the Court mentioned Carignan, Tuggle, Deason, Donnelly, Admr. Brown, and Bouse. We then referred to our summary following Part II of our Statement of Facts where we summarized the testimony of Carignan, Tuggle, Deason, Hice, Spriggs and Donnelly, Admr. Brown (also known as the Pauline Brown case) (Petition pp. 44-66), so our argument was not confined to the three witnesses.

While on page 11 of Respondent's Reply Brief herein it refers to the testimony of certain other witnesses it nowhere contends that the witnesses named on page 12 of the opinion and thereafter discussed at length by the Missouri Supreme Court were not considered by Respondent as the strongest witnesses in support of the result reached by that Court.

Petitioner, p. 117, only refers to the "Summaries" of the testimony of the only witness who said anything in the record that could properly be considered adverse to Petitioner on the important issues, including those relied upon by the Court as being adverse. These Summaries cover pages 44 to 66 of the Petition and digest the testimony of Carignan, Tuggle, Deason, Bouse, Hice, and of Petitioner's testimony relating to Pauline Brown and Spriggs, neither of whom testified. In referring to "page 12" of the Opinion (Pet. pp. A30-A31), Petitioner was only saying that the above summaries included the summarized testimony of the witnesses mentioned by the Court whose adverse probative value was thereby nullified and destroyed. The Court at page 12 of its Opinion did not limit its reference and discussion to Tuggle, Carignan and Deason, as stated by Respondent. It also said, "* * * we shall review a number of cases in which Jennings, Brown and Fenn participated". These men were the investigators in the cases for certain clients whom the Court proceeds to name and discuss their cases, as well also as the testimony of Tuggle and Carignan (on later pages of the Opinion) whose cases were investigated by Smith. Thus, on page 12, the Court discussed the case of Pauline Brown, investigated by Jennings, her cousin. Then the Bouse case, investigated by the late J. N. Fenn, of Clovis, New Mexico, was discussed (Pet pp. A31-A34). The discussion of the testimony of Tuggle and Carignan follows (Pet. pp. A34-

A40), then that of Deason, whose case was investigated by Brown (Pet. pp. A40). But the important point Petitioner was clearly making was that the "Summaries" included the testimony not only of the several clients discussed by the Court, but also that of or relating to all others who in any view could be considered adverse to Petitioner. So that the Court's statement, "We could go on and on discussing other cases" (Pet. p. A42) adds nothing to the force or substance of its Opinion, since such Summaries showed that all those not discussed by the Court were 'subject to the same frailties" as those it did discuss.

Respondent's purpose in making the inaccurate and baseless attack upon statements in the Petition herein, p. 117 of Respondent's Reply Brief, though at first puzzling, becomes apparent in what follows, p. 11 of Respondent's Reply Brief. It is a device to create the false impression that Petitioner is claiming that the Court discussed and decided his guilt upon only three cases, Carignan, Tuggle and Deason, and that having discredited and destroyed their testimony he could dispose of all other witnesses by a sweeping general statement, which he would not be justified in doing in view of Respondent's impressive and extravagent characterization of the supposed testimony of a host of witnesses not otherwise accounted for by Petitioner. Counsel omits to say that most of the cases to which he alludes, p. 11, are the subject of "Summaries" in the Petition (pp. 44-66), an examination of which will, we confidently believe, refute the unjustified imputations. Certainly a reading of the entire evidence in the record relating to these cases, page references to which are contained in the "Summaries", will suffice to dispel any reasonable probative effect to establish the conclusions stated.

We have demonstrated above that in the Jarboe case not included in the "Summaries", the testimony does not

reasonably support either Respondent's stated conclusion or that of the Court, because both base their conclusion upon Mrs. Jarboe's *ex parte* testimony, which at the most was equivocal after eight years, whereas, when she testified some months later on cross-examination, after refreshing her recollection, she repudiated all said *ex parte* testimony upon which the stated derogatory conclusion is founded (4-950-978, 498-1018). The Court below, as stated, ruled with its Special Commissioner that it would throw out and not consider this latter testimony, and Respondent here does likewise.

Moreover, it would seem that by thus building false conclusions upon a false premise, Respondent hopes to gain a psychological victory to which it is not entitled. Respondent knows that this Court is greatly overburdened and can review only a limited number of cases. So, if it is able to create a quick, initial impression that substantial justice was probably done below by making a number of sweeping and irresponsible statements concerning what the evidence established that possibly might entail the time-consuming task of examining a large record to determine the truth or falsity thereof, the Court might conclude to deny a review. That such is Respondent's strategy is suggested elsewhere in its Brief concerning which we will have more to say further on.

## IV. Claimed Omissions and Inaccuracy in Petition for Writ.

Respondent, p. 12 of its Reply Brief, asserts that Petitioner's Summary in Spriggs (Pet. pp. 63-66) shows inaccuracies and omissions "illustrative of omissions and inaccuracy indulged in by Petitioner in summarizing evidence from the record". Then follows a series of various matters stated to have been shown by the record and found

by the Court and the Commissioner in Spriggs, claimed to have been stated inaccurately or omitted in the Summary. It is submitted that Petitioner's Summary is a fair and full statement of the testimony in the record relating to the Spriggs matter as shown both by the page references in the Summary and in Respondents' Brief. Also, the Summary fairly and accurately states the facts which the evidence proves, which Respondent does not do. Thus, to point out a few misstatements in which Respondent indulges: (1) Spriggs was killed at Ricardo, N. M., which was not "several hundred miles from Clovis", as stated, but according to the Santa Fe Time Table, was 73.6 miles; (2) he was not killed "at four o'clock in the afternoon" on August 22, 1949, as stated, but at 1:45 P.M. on said day (Ex. 2-2a, 10-2564); (3) Fenn was not at the Spriggs home in Clovis "the evening of August 22, 1949", as Respondent states, but refused the request to go that day of Mr. Valentine who was acting at the behest of Mrs. Spriggs and her mother, Mrs. Morton. He did not go until Mr. Valentine came to him the second time at the urgent request of deceased's family which was the day following. "* * * but when Valentine came back the next day, he went" (Comm. Rep. p. 88, 8-2010, 2011); (4) Fenn did not mail the contract to Petitioner, as stated. "Randolph testified * * * but did not know who sent them" (Comm. Rep. p. 59, 5-1153). For a further statement fairly summarizing the testimony in Spriggs, keyed with page references to the record, which effectively demonstrates the falsity and unfairness of the imputations implicit in Respondent's stated conclusions, see Petitioner's statement in his Brief in the Missouri Supreme Court where he was designated as Respondent (Br. pp. 13-15).

The only other case mentioned, pp. 11 and 12, of its Reply Brief, by Respondent which is not fully covered in the "Summaries" (Pet. pp. 44-46) is Taylor. To save

space and the time of all parties concerned, we refer the Court to a fair and succinct statement of the pertinent facts in Taylor, with appropriate references to the record, found also in Petitioner's (Respondent's below) printed Brief, in the Missouri Supreme Court pp. 11-13, a copy of which brief is attached to the Transcript of the Record Proper (Two Volumes) certified by the Clerk of the Missouri Supreme Court. Also, as to how and when the question of whose handwriting Taylor's first letter was in arose, see Vol. 10, pp. 2573-2577, of the record.

Moreover, we think that a comparison of the extravagant and unjustified assertions, Respondent's Reply Brief, pp. 11 and 12, as to what the evidence proved in a number of cases, with the evidence in the record relating to them will go far to convince the Court that the Missouri Court and its Advisory Committee permitted suspicion and surmise to perform the office of evidentiary and legal proof, which combined with a prosecution complex resulted in an unwarranted finding of guilt which fails to meet Federal Constitutional requirements of due process and equal protection of the law guaranteed by the Fourteenth Amendment (Pet. pp. 107-112).

For further and additional digests and summaries, of the evidence relating to certain cases, with page references to the record, which will conserve the time and labors of the Court, see also Petitioner's (Respondent below) printed Brief in the Missouri Supreme Court, as follows: Hice, p. 388; Tuggle, pp. 20-30; Carignan, pp. 31-38; Deason, pp. 38-49, 109-132; Jarboe, pp. 50-55; Pauline Brown, pp. 55-56; C. C. Jennings, pp. 58-59; Spriggs, pp. 13-15.

### V. The Law Pertaining to Due Process and Sufficiency of Proof.

Respondent in its Reply Brief has seen fit to ignore and remain silent, except on the periphery by an occa-

sional inference, concerning all except one of the constitutional questions, timely and duly raised and sharply presented in the Petition for Certiorari herein (Pet. pp. 6-9, 41-44, A60-A72, A74-A85, 83-127). Some of these questions counsel does not even mention. Respondent undertakes to discuss only the Court's Rule 5.03 (Reply Br. pp. 5, 6, 7 and 16), but only one aspect of the Rule—the function of the Advisory Committee to investigate Missouri lawyers and to find probable cause to file against them in court. This, it is said, Respondent's Reply Brief, pp. 6, 7, is a function performed by every grand jury, which would be invalidated under Petitioner's contention.

But this argument is a palpable evasion. It wholly fails to meet the Fourteenth Amendment violations inherent in the Missouri Court's Rule 5 and relied upon in the Petition herein (Pet. pp. 5, 11, A89-A101, 66-72, 75, 77-83). When that "Grand Jury", after its investigation of the lawyer and voting a "True Bill", fails to disband and bow out of the controversy, but instead files an action thereon in the Court in its own name, assumes the role of prosecutor and proceeds to marshal the witnesses and the evidence and prosecute him vigorously through the Courts, we are beginning to have some of the elements of this case. When there is added to these steps the further ingredients that this "Grand Jury" is part and parcel of a Supreme Court that named it and also made the laws (Rules) under which the lawyer was so investigated, set up such procedural machinery, and is the tribunal before which the lawyer is tried and convicted, then we have this case (Pet. pp. 66-72, 75, 77-82). Also when that "Grand Jury", as here, is vested with the absolute, unfettered and arbitrary power to decide in secret which lawyer it will choose to openly disgrace and which lawyer it will choose not to disgrace and "seal the record" as to the latter, without any supervision of a representative of

another branch or department of government, such as a prosecuting attorney, such power also becomes invidiously discriminatory and void under the Fourteenth Amendment. *Yick Wo* v. *Hopkins*, 118 U.S. 356, 6 S. Ct. 1064 (Pet. pp. 77-78).

Respondent apparently takes signal comfort from recent cases of this Court touching various aspects of the relationship of lawyers to the Courts and the public (Br. 13-16). After a brief reference to the Cohen (81 S. Ct. 954) and Lathrop (81 S. Ct. 1826) cases, it is asserted with apparent confidence, p. 14:

> "The foregoing authorities fully establish that Rules 4 and 5 promulgated by the Supreme Court of Missouri provide for procedural due process with respect to disciplinary proceedings".

With deference, we submit that these cases do not establish or even remotely support the validity of such rules against the attacks Petitioner here makes under the Fourteenth Amendment. There is no similarity between this case and either of those cases, in the facts, in the issues or in the law involved.

In Cohen the Court decided only the narrow question of whether New York could, consistent with the Fourteenth Amendment, "disbar an attorney who, relying on his state privilege against self-incrimination, has refused to answer material questions of a duly authorized investigating authority relating to alleged professional misconduct" (81 S. Ct. l.c. 955). For the background of the legislative authority creating the Inquiry and the proceedings upon which the controversy was based, the Court (81 S. Ct. 956) referred to the prior case of *Anonymous Nos. 6 and 7* v. *Baker*, 360 U.S. 287, 79 S. Ct. 1157. The Legislature by Sec. 90, subd. 10 of New York's Judiciary Law had vested in the Appellate Division of the Supreme Court (trial

court) the power over the admission and discipline of members of the bar. Upon Petition by the Brooklyn Bar Association, alleging unethical practices in Kings County, the Appellate Division set up an Inquiry at a Special Term of the Supreme Court to be presided over by Justice Arkwright to conduct hearings and report back to the Appellate Division with his recommendations (360 U.S. 288, 289, 79 S. Ct. 1158). Cohen was subpoenaed to appear at the Inquiry and testify as a witness and to produce certain records. He refused to answer pertinent questions relating to his knowledge and activities of the character which was the subject of the Inquiry, claiming privilege against self-incrimination under the New York Constitution. The judge in charge of the Inquiry reported these facts to the Appellate Division recommending disciplinary action. The Bar Association filed a petition for discipline of Cohen in the Appellate Division for refusal to testify before the Inquiry as a violation of canons of ethics requiring lawyers to be candid and frank before the Court and to inform the Court of known infractions of canons forbidding fee-splitting with laymen, etc. (McKinney, N.Y. Laws, Judiciary Law, pp. 774-775). The Appellate Division ordered disbarment, not for claiming his privilege against self-incrimination, "but rather the fact that he has deliberately refused to co-operate with the court in its efforts to expose unethical practices * * *" ( ... U.S. ....., 81 S. Ct. 956-953). The New York Court of Appeals affirmed. This court on Certiorari only held (1) that the failure of N. Y. to afford protection against self-incrimination under its Constitution was not a matter of Federal concern (2) that the Fourteenth Amendment did not implement the Fifth Amendment to the Federal Constitution so as to require New York to grant such immunity under said amendment, and (3) that New York's judicial inquiry into such practices and compelling such testimony

was not so devoid of rational justification as to be arbitrary or discriminatory that Cohen was deprived of his liberty without due process.

So it is clear that in Cohen, contrary to the provisions of Rule 5, the Judge who conducted the Inquiry confined his activities to investigative functions of a grand jury. Unlike a grand jury he did not even charge Cohen with an offense (indict), much less did he file and prosecute a charge. He only reported the evidence to the Appellate Division with his recommendation. There his connection with the case ended. Nor did the Appellate Divison, the trial court in the case, file and prosecute the charge. This was done by the Brooklyn Bar Association. On appeal from the conviction the case was reviewed by yet another separate and independent tribunal, the N. Y. Court of Appeals. Moreover, the laws (canons) for a violation of which he was tried, as well as the entire machinery used, was authorized and provided for by still another branch of government—the New York Legislature.

Aside from the above, this Court in the Cohen case would seem to have left open for consideration such questions as Petitioner's condemnation of Rule 5 on Federal Constitutional grounds, in using (81 S. Ct. 962) the following language:

> "Clearly enough, factual distinctions are the determinative consideration upon the question of what process is due in each of these cases. Otherwise making state procedures vary solely on the basis of the given occupation would indeed be nothing less than a denial of equal protection to bankers, contractors, railroad employees and government employees."

Likewise, in Lathrop there is nothing said to ease the impact of the Fourteenth Amendment infirmities that clearly inhere in Missouri's Rule 5. Nor did this Court

hold or infer, as stated at page 14, "that the highest courts of the States have inherent power to promulgate rules with respect to the integration of the Bar, including procedures for the initiation of disciplinary proceedings * * *." Instead, the Court in its plurality opinion points out that the Wisconsin Legislature first passed a law to integrate the state bar providing, "the Supreme Court by appropriate orders shall provide for the organization and government of the association", etc., which the Supreme Court later implemented in its integration order, this Court saying,

> "Integration of the Bar was effected through an interplay of action by the legislature and the Court * * *." (81 S. Ct. 1828).

Also:

> "Integration of the Bar in Wisconsin bore no resemblance to adjudication. The State Supreme Court's action disposed of no litigation * * * the action had the characteristics of legislation." (Id. 1829).

This Court in Lathrop only affirmed the action of the Wisconsin Supreme Court in sustaining the demurrer to the plaintiff's petition in which he sought a return of his dues which he as a Wisconsin lawyer was compelled to pay to the Wisconsin integrated Bar, based upon his claim of a violation of his rights of association and freedom of speech under the First Amendment. A majority found that his claim of a violation of his right of association was without merit. His claim of a violation of freedom of speech did not muster a majority of this court either pro or con.

In the Lathrop case, as in Cohen, this Court stresses protective provisions contained in the Wisconsin Integrated Bar, the absence of which from Rule 5 marks the latter's infirmities under the Fourteenth Amendment in the respects here challenged by Petitioner.

Thus, this Court finds it pertinent to quote from the Wisconsin opinion that the acts complained of were not those of the Wisconsin Court, but a great majority of the individual lawyers of the State, saying the Court had determined,

> "* * * that it promotes the public interest to have public expression of the views of a majority of the lawyers of the state, with respect to legislation affecting * * * the practice of law, the same to be voiced through their own, democratically chosen representatives comprising the board of governors of the State Bar." (Id. p. 1838-1839).

Moreover, it was pointed out that the Integrated Bar decentralized disciplinary powers and procedures from the Court itself to local grievance committees named by the Bar's popularly elected representatives through whom the Integrated Bar functioned:

> "It found that the State Bar's participation in the handling of grievances improved the efficiency and effectiveness of this work." (Id. p. 1836).

Also:

> "Prior to integration the Board of State Bar Commissioners (The counterpart of the Advisory Committee in Missouri) conducted and paid for the investigation of grievances. Since then the grievance committees have performed most of that work, * * * a former president of the State Bar commented of these committees' performance of their functions: 'The result is that a majority of complaints are adjusted or explained to the satisfaction of the complainant, and the State Bar Commissioners are saved considerable time and effort * * *'." (Id. 1836, Note 11).

This vital separation of the investigative powers from the determination of guilt or innocence of the lawyer was also pointed out in said opinion in Lathrop:

> "Although the State Bar participates in the investigation of complaints of misconduct, * * * final power to disbar or otherwise discipline any member resides in the Supreme Court." (Id. p. 1830, Note 6).

Reverting to the Cohen case, this Court did not hold, as Respondent assumed, p. 14, Respondent's Reply Brief that a state can constitutionally combine investigational, prosecutional and adjudicatory functions in one person or body as Rule 5 clearly does, but only that it may afford a different procedure in "judicial investigations" (which the "Inquiry" acting as a grand jury was), from that in "criminal prosecutions". (81 S. Ct. p. 962).

It is difficult to perceive any basis for Respondent's contentions, p. 15 of its Reply Brief, in the recent decisions of this Court in Konigsberg ( U.S. , 81 S. Ct. 997) and Anastaplo ( U.S. , 81 S. Ct. 978). This Court in the majority opinion pointed out in Anastaplo (81 S. Ct. p. 982) that the basic issues in that case were settled in Konigsberg (Majority Opinion), saying:

> "We have there held it not constitutionally impermissible for a State * * * to adopt a rule that an applicant will not be admitted to the practice of law if, and so long as, by refusing to answer material questions, he obstructs a bar examining committee in its proper functions of interrogating and cross-examining him upon his qualifications."

We find nothing in either of these cases incompatable with or that militates against any contention made in our Petition herein. Respondent points to nothing of that character in either case.

Respondent, pp. 16, 17, 18 and elsewhere in its Reply Brief, in criticism of the Petitioner herein, states that this Court is not concerned with such matters as conflicts in the testimony, the credibility of the witnesses, the weight

of the evidence, trial errors, retrying a case on the merits, and like questions. In this, Counsel chooses to ignore the substantial and important question raised by Petitioner and supported by many cases cited from this Court that the evidence in this case, as a matter of law, does not either under Missouri decisions or under the decisions of this Court support the judgment herein of Petitioner's guilt and thereby deprived him of Due Process of Law under the Fourteenth Amendment (Pet. pp. 8, 107-112).

Under this point Respondents attempt to demonstrate that the finding of facts of the Supreme Court of Missouri is conclusive on this Court.

In support of such contention Respondent quotes on page 16 of their brief from the case of *Milk Wagon Drivers Union, etc.*, v. *Meadowmoor Dairies*, 312 U.S. 287, 61 S. Ct. 552, l.c. 555. On the same page and shortly preceding Respondent's quotation this Court said:

> "Still it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality. That is why this Court has the ultimate power to search the records in the state courts where a claim of constitutionality is effectively made."

Furthermore it is our contention that this case comes within the exception noted in Respondents' quotation, to wit: that the findings are "so without warrant as to be a palpable evasion of the constitutional guarantee here involved."

To accept such a conclusion as Respondents advance "would deny the long course of judicial construction which establishes as a principle that the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest." *Kern-Limerick, Inc.*, v.

*Scourlook*, 347 U.S. 110, 121, 74 S. Ct. 403, 410 and cases cited in footnote 11.

In the case of *Craig* v. *Harney*, 313 U.S. 367, 373, 67 S. Ct. 1249, this Court said (l.c. 1253):

> "In a case where it is asserted that a person has been deprived by a State court of a fundamental right secured by the Constitution, an independent examination of the facts by this Court is often required to be made. See Norris v. State of Alabama, 294 U.S. 587, 590, 55 S. Ct. 579, 580, 79 L. Ed. 1074; Pierre v. State of Louisiana, 306 U.S. 354, 358, 59 S. Ct. 536, 538, 539, 83 L. Ed. 757; Chambers v. State of Florida, 309 U.S. 227, 228, 229, 60 S. Ct. 472, 473, 474, 84 L. Ed. 716; Lisenba v. People of State of California, 314 U.S. 219, 237, 238, 62 S. Ct. 280, 290, 291, 86 L. Ed. 166;
>
> Ashcraft v. State of Tennessee, 322 U.S. 143, 147, 148, 64 S. Ct. 921, 923, 88 L. Ed. 1192. This is such a case."

In the case of *Oyama* v. *State of California*, 332 U.S. 633, 636, 68 S. Ct. 269, this Court said (l.c. 270):

> "In approaching cases, such as this one, in which federal constitutional rights are asserted, it is incumbent on us to inquire not merely whether those rights have been denied in express terms, but also whether they have been denied in substance and effect. We must review independently both the legal issues and those factual matters with which they are commingled."

In the case of *Napue* v. *People of the State of Illinois*, 360 U.S. 264, 271, 79 S. Ct. 1173, this Court said (l.c. 1178):

> "The duty of this Court to make its own independent examination of the record when federal constitutional deprivations are alleged is clear, resting, as it does on our solemn responsibility for maintaining the Constitution inviolate. Martin v. Hunter's Lessee, 1

> Wheat. 304, 4 L. Ed. 97; Cooper v. Aaron, 358 U.S. 1, 78 S. Ct. 1401, 3 L. Ed. 2d 5. This principle was well stated in Niemotko v. State of Maryland, 340 U.S. 268, 271, 71 S. Ct. 325, 327, 95 L. Ed. 267."

On page 17 of Respondents' Reply Brief it is stated:

> "The only logical conclusion to be reached is that the proof of Petitioner's guilt had to be all the more conclusive because of the character of testimony in the case."

We submit that conclusion is disproved by the fact the Commissioner and the Court elected not to believe the testimony of Petitioner with his good reputation but chose to believe instead the impeached and self-contradictory testimony of witnesses such as Tuggle, a forger and blackmailer and Deason, a blackmailer (Petition pp. 75-76, 72-73, 26).

Respondent, p. 17, criticizes Petitioner in a similar vein for devoting two-thirds of a page in his statement (Pet. p. 15) to the impressive list of character witnesses to his good character and reputation for veracity and ethical conduct, charging this to be a violation of this Court's Rule 23 (c) and (e) as not "a concise statement of the facts." In so doing he likewise fails, as did the Missouri Court, to give Petitioner the benefit of Missouri decisions holding that where the evidence establishes the accused lawyer's good reputation his testimony cannot be overturned by contrary testimony of disreputable and unscrupulous clients and others of an equivocal nature, or where they are impeached and discredited, which was clearly shown here (Pet. pp. 44-66). *In re Frith*, 233 S.W.2d 707, 717; *In re Mason*, 203 S.W.2d 750, 769. Similarly, this Court holds that where a valuable right has been conferred upon a person or he has attained a status pursuant to a proceeding by which it is determined that he possesses the qualifica-

tions, character and other requisites to such right or status, such as a right to citizenship, he cannot be deprived thereof in a subsequent proceeding to revoke such right or status except on proof "by 'clear, unequivocal, and convincing' evidence which does not leave 'the issue in doubt' ". *Schneiderman* v. *United States,* 320 U.S. 118, 158. Also that the attempt to revoke such right or status must fail as a matter of law where the evidence is conflicting.

> "* * * the evidence is sharply conflicting. The presence of this conflict is the second weakness in the Government's chain of proof" (Id. p. 155).

Therefore, the character testimony not only became one of the predicates to establish Petitioner's right to an acquittal for failure of the evidence to convict him, but this testimony also established that the Missouri Court evaded the prior decisions in Frith and Mason and thereby engaged in arbitrary, capricious, and discriminatory action which further deprived him of due Process and Equal Protection of the Law in violation of the Fourteenth Amendment (Pet. p. 108 *et seq.*).

## VI. Rules 23(c) and 23(e).

In an effort to avoid meeting the case on its merits Respondent charges that our Petition for the Writ herein violates rule 23 (c) and 23 (e), which "requires that questions for review here be presented without unnecessary detail and by a concise statement of facts." It cites no cases in support of its challenge to the Petition.

What is a concise statement of facts without unnecessary detail necessarily depends on the facts and issues to be presented.

The basic issues here are briefly: whether Petitioner received a fair trial "before a tribunal which meets at least

concurrently prevailing standards of impartiality." (*Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 50, 71 S. Ct. 445, 454); whether the hearing Petitioner received was "a real one, not a sham or a pretense" (*Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 164, 71 S. Ct. 624, 644); whether the Supreme Court of Missouri acting directly or through its wholly controlled agencies has not deprived Petitioner of his Constitutional rights to a fair trial in a case where it occupies the position of party, prosecutor, advocate and arbiter (Petition pp. 67-72) and by its opinion demonstrates its great interest and concern in upholding and vindicating the actions of its agencies in the prosecution and in punishing Petitioner for resisting such agencies by making a defense against the charges filed against him; whether the disbarment of Petitioner is without rational support in the evidence; and whether the Missouri Supreme Court has refused to apply the established rules of evidence in this case in an arbitrary and discriminatory manner.

The presentation of such issues necessarily requires a longer and more detailed statement of facts than the ordinary case in order to fully and fairly present the facts and issues here involved.

We submit that considering the complexity of said issues our Petition complies with the rules in the respects mentioned by Respondent.

Furthermore, we have divided our Petition into appropriate heads with descriptive sub-headings which enable the Court to quickly and easily read and understand our contentions and the actual facts shown by the record.

We have already answered Respondent's argument on page 18 of its Reply Brief and in its Appendix I to such brief as to the right to effective confrontation and cross-

examination under point I, *supra*, this brief and at pages 97 to 103 of the Petition herein.

## VII. The Missouri Court's Opinion Cannot Be Defended Against the Attacks Here Made under the Federal Constitution.

On page 13 of their brief Respondent adopts as the premise to its brief the formula that notice and hearing before a legally competent tribunal fully satisfies all the requirements of due process. It does not recognize essential fairness as any part of this constitutional concept and does not undertake to defend against our charge of fundamental unfairness in the trial and conviction of this Petitioner.

In the case of *Carter* v. *People of State of Illinois*, 329 U.S. 173, 67 S. Ct. 216, in a Certiorari proceeding this Court said (l.c. 218):

> "The solicitude for securing justice thus embodied in the Due Process Clause is not satisfied by formal compliance or merely procedural regularity. It is not conclusive that the proceedings resulting in incarceration are unassailable on the face of the record. A State must give one whom it deprives of his freedom the opportunity to open an inquiry into the intrinsic fairness of a criminal process even though it appears proper on the surface. Mooney v. Holohan, 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791, 98 A.L.R. 406. Questions of fundamental justice protected by the Due Process Clause may be raised, to use lawyers' language, dehors the record."

Respondents have not attempted to answer our charge that the Missouri Supreme Court in this hearing acted both as judge and party, arbiter and advocate in the same cause and that such is the necessary result of its Rule 5.

In the case of *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 50, 70 S. Ct., this Court said (l.c. 454):

> "When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality."

We confidently believe that after reviewing the record this Court will conclude the State determination was without rational support in the evidence as was the situation in the case of *Konigsberg* v. *State Bar of California*, 353 U.S. 252, 77 S. Ct. 722, 1 L. Ed. 2d 810.

There is a vague undertone throughout Respondent's discussion of the Constitutional infirmities in the Missouri machinery and procedure in disbarment proceedings which were implemented in this case, seeming to bottom an explanation and excuse for the court's departure from constitutional procedures upon an ancient notion of "inherent power" of courts over members of the bar as "officers of the Court". However, in view of rather definite pronouncements of this Court in recent years that the right to practice law is something more than a mere privilege to be given, withheld or taken away at the will of the State, but instead is a valuable property right of which a person may not be deprived except for cause and through procedures that satisfy well known Federal Constitutional safeguards (*Schware*, 77 S. Ct. p. 756; *Konigsberg*, 77 S. Ct. p. 721; *Summers*, 325 U.S. 561, 566-67, 568-69, 65 S. Ct. 1307, 1310; *Ex parte Garland*, 71 U.S. 366, 370), counsel apparently has not seen fit to take a firm stand upon such unstable concept of a lawyer's status. Although making an occasional reference to the "inherent" power of the courts in such matters he does not attempt to define the exact nature or scope of such supposed power. Rather the argument seems to assume that Petitioner in

this disbarment proceeding on account of the Missouri Court's "inherent" power has no standing to complain of Fourteenth Amendment encroachments which admittedly would be available to persons in other relationships. Thus it is stated, Respondent's Reply Brief, p. 18:

> "the kind and character of judicial proceedings conducted with respect to the petitioner in this case meets all the requirements * * *." etc.

Respondent, p. 18 of its Reply Brief, also refers to Petitioner's trial as being "in accordance with traditional judicial proceedings".

Let us examine this vaunted "inherent power of the Court over the bar" that brooks no interference, recognizes no judicial restraint, and defies all classification among well-ordered legal procedures of otherwise constitutional governments, that Missouri and some other states adhere to.

Concededly, and as a matter of judicial notice, it had its origin in the early English courts which were the agencies of kings having absolute and despotic power. No doubt this claimed inherent power of the King's Courts over the Bar was a device of the Crown to salvage a modicum of the tyrannical prerogatives King John was forced to surrender to the nobles when at Runnymede in 1215 he signed the Magna Charta, which is the foundation of our Bill of Rights and by implementation as amendments to the Federal Constitution, the cornerstone of our liberties.

This concept of absolute power of the Crown over the bar through the king's courts followed English rule to America among the colonies. That rule was ended by the American Revolution. The former English colonies then passed from the domination of an absolute monarchy to

free, independent and sovereign states dedicated to democratic ideals and to a representative form of government, based upon constitutions embodying the principles announced in the Declaration of Independence. These states shortly thereafter under the Federal Constitution, became part and parcel of our Federal Government. England was never under a constitutional form of government.

It is true that the English common law became the foundation in part of American jurisprudence, including that of most of the states, but only to the extent that it was appropriate to like or similar conditions in America and comported with our constitutional government. Missouri did this by statute in effect since statehood which limited common law adopted to such principles as were "not repugnant to or inconsistent with the constitution of the United States * * * or the statute laws * * *" Sec. 1.010, R.S. Mo. 1949. Many principles of the common law in England have been outmoded in America both because of the times and the differences in the conditions, laws and needs in the two countries. To illustrate, under old English common law it was recognized that the master not only had a right to the services of his servant but also the right and authority to inflict physical punishment on him. Even the more harsh but descriptive term of that relationship has largely given way to that of Employer and Employee in modern America. Moreover, under the old English common law the husband was absolute master of his household and even had the right and privilege to inflict physical punishment on his wife. In modern America the wife has become in every way the equal of her husband if not his superior.

Other cogent considerations intervene which leave little doubt that the old English notion of "inherent power" over the bar by the courts, which either necessitates or

permits procedures that infringe upon Constitutional rights, is wholly incompatible with conditions in the bar and the courts as they exist in America today, and more especially in Missouri.

In Missouri in the rural areas the judges of the trial courts who must be lawyers (Const., Art V, Sec. 25), are elected by popular vote and must answer to the people. Even under Missouri's Nonpartisan Court Plan, while a judge is nominated from members of the bar by a commission and appointed by the Governor he is still required at stated intervals to submit his record as a judge to the people for approval or disapproval and may continue in office only upon receiving a majority favorable vote of the people. Article V, Section 29 (a) to (g), Mo. Const., 1945, Vol. 1, Vernon's Annotated Missouri Statutes, R.S. Mo., 1949, p. 334.

The reasons assigned by the Missouri Courts for the claimed unbridled power of the courts to control and discipline the bar through such unorthodox procedures and by evidence that does not satisfy reasonable requirements of trustworthiness is for the protection of the Court, the profession and the public, due to the Bar's peculiar opportunity to do great public harm. *In re Pate*, 119 S.W.2d 11, 24. But the judges, who are the lawyers of yesteryear, are in a position to do the public and all concerned vastly greater harm (they adjudicate legal rights, not merely advocate causes). When charges of misconduct are made against them they are provided by law an elaborate system whereby they must be charged through protective procedures by one body, be prosecuted through another and tried through yet a third body, before they can be removed as judges (1945 Const., Art. VII, Sec. 1).

So, it would seem obvious that it is irrational, arbitrary and discriminatory for Missouri to provide, as it clearly

does, that the stated public policy will be promoted by trying its practicing lawyers, whether based upon any notion of "inherent" power over them by the courts or not, by a procedure and system of proof of the above character which are devoid of the constitutional safeguards pointed out herein by Petitioner, but that such policy is protected in the trial of the lawyers of the Judiciary by procedures and systems of proof which fully meet all constitutional requirements.

It would seem that the courts, the profession and the public are amply protected against any improper conduct of lawyers in their relations with the courts, by the court's powers of direct and indirect contempt, to which lawyers and laymen alike are subject. As to other infractions and misconduct of lawyers, not directly affecting the functioning and dignity of the court, there would seem to be no logical or valid reason why they should not be redressed by procedures and proof media that observe and satisfy the fundamental rights of all which are implicit in American Constitutional government, and which as a minimum would insure them a fair trial before a fair tribunal.

In the case of *Cohen* v. *Hurley*, 81 S. Ct. 955, 962, in a lawyer case this Court stated that factual distinctions are determinative of what process is due in any case and it would be a violation of the Constitution to make a person's occupation the sole basis of what is due process as to him.

In view of Respondent's introductory paragraph, p. 13, to his discussion of the Missouri Court's exercise of "original jurisdiction" in this case and its attempt thereby to buttress the soundness of the Court's jurisdiction and judgment against the constitutional attacks made by Petitioner, we think it pertinent and relevant to point out how

tenuous the Court's claim to a right of "original jurisdiction" really is.

The Missouri Constitution of 1875 limited the Supreme Court's jurisdiction, except for issuing extraordinary writs and exercising superintending control over all inferior courts, to "appellate jurisdiction only". (Art. VI, Sec. 2, p. 215, Vol. 1, V.A.M.S. Const.). The language of the 1945 Missouri Constitution in this respect though slightly different does not confer "original" jurisdiction upon the Supreme Court. (Secs. 1, 3, 4, Art. V, *id.* p. 328). (See Appendix following for text of constitutional provisions.)

The Court has never contended that any Missouri Constitution ever in terms either empowered the judiciary to control lawyers or regulate the practice of law, much less that it conferred original jurisdiction in disbarment cases, or in any other case upon the Supreme Court and Courts of Appeals. *In re Richards*, 333 Mo. 907, 63 S.W.2d 672, *In re Pate*, 232 Mo. App. 478, 107 S.W.2d 157. Rather it reasons that under the "separation of powers" provision of the Missouri Constitution (Pet. p. 11) all judicial powers are "confided to the courts", and that the practice of law before the courts so affects the functioning thereof as to be a part of the judicial branch of the government, so that lawyers by implication of law under said provision of the constitution become adjuncts of the courts and subject to supervision by the latter. *In re Richards, supra.* This contention becomes the predicate for the Missouri Courts' so-called "inherent power" over the lawyers of the state, we have discussed above.

But quite aside from the concept of "inherent power" of the Courts over the Bar by virtue of such provision for the separation of powers, the conclusion of the Missouri Supreme Court that it has "original jurisdiction" of dis-

barment cases, when the constitution limits its jurisdiction to "appellate jurisdiction only", is illogical and irrational. The Constitution in specifying the different courts making up the judiciary names the Circuit Courts (trial courts), the courts of appeals and other courts, as well as the Supreme Court (1945 Const., Art. V, Sec. 1). Would they not, especially the trial courts, also have inherent powers over the Bar for similar, and even more cogent, reasons to exercise such powers based upon their greater and more continuous contacts with the Bar? To say that the Supreme Court has "original jurisdiction" to try disbarment cases instead of appellate jurisdiction to which the constitution limits it in all cases, because the separation of powers clause "confides to the judiciary" the power to discipline the Bar is a *non sequitur*. Moreover, we have here the paradox of the Court pointing to the "separation of governmental powers" provision of the State Constitution as the source of both its claimed "inherent powers over the Bar" and its "original" jurisdiction in disbarment cases, on the one hand, and on the other hand violating every aspect of the same provision in the procedures to be followed in such cases which the Court sets up in its Rule 5! (Pet. pp. 5, 66-72).

For the uncertain and doubtful status of the Court's holding that the Supreme Court and the several courts of appeals have "original jurisdiction" or "inherent power" in disbarment proceedings under the Missouri Constitution, see the Court's discussion of this matter in *In re Richards*, 333 Mo. 907, 63 S.W.2d 672, wherein Richards attacked such jurisdiction, particularly as to "original" jurisdiction on the authority of *In re Sizer & Gardner*, 300 Mo. 369, 254 S.W. 82, and other authorities. The court, p. 673, referred to its former case of *Selleck* v. *Reynolds*, 252 Mo. 369, 158 S.W. 671, and said concerning its holding in Selleck:

> "While conceding that the case * * * 'did not fall within these granted powers, and that the legislature could not add to the powers named in the Constitution, this Court in banc held * * * the St. Louis Court of Appeals possessed inherent power to disbar * * *"

The Court went on to state that in *Sizer, supra,* that the Court by five to two denied a similar contention, though the judge who wrote the opinion agreed that the Court did not have jurisdiction under the Constitution, but since the Court had upheld jurisdiction for many years he thought it unwise to overrule those cases. Also that three judges concurred only in the result.

The Missouri Supreme Court, Westhues, J., in *Auto Club* v. *Hoffmiester,* (1960) 332 S.W.2d 957, 959, wherein a review was sought of the determination by the St. Louis Court of Appeals of an appeal from a judgment of a Circuit Court in a case involving the unlawful practice of law covered by these rules of the Supreme Court, said:

> "Appellate jurisdiction of this court is fixed by Sec. 3 of Art. V, 1945 Const. of Mo., V.A.M.S. The legislature cannot nor may this court by rule enlarge that jurisdiction except as provided for in that section of the constitution. 21 C.J.S. Courts, Sec. 400, p. 641; St. ex rel. Wabash Ry. Co. v. Shain, 341 Mo. 19, 106 S.W.2d 898."

On this question of whether or not the Supreme Court has "original jurisdiction" or the Judiciary in Missouri has "inherent power" over the Bar, it must not be overlooked that in the cases from other jurisdictions heretofore cited and relied upon in the Court's opinion and in Respondent's Brief, the power of the court was definitely traced, and shown to have been conferred upon the Court by the Constitutions of the States or other valid state legislation, which was not the case in Missouri.

Thus, in *Cohen* (81 S. Ct. 954), and *Anonymous Nos. 6 and 7* v. *Baker*, 79 S. Ct. 1157, which arose out of the same "Inquiry" set up by the Appellate Division of the Supreme Court (Trial Court) of New York, this Court said:

> "These practices have received legislative approval, evidenced by Sec. 90, subd. 10 of the State Judiciary Law, * * *" (79 S. Ct. 1160).

Also in *Gair* v. *Peck*, 6 N.Y. 2d 97, 188 N.Y.S. 2d 491, 160 N.E.2d 43, the New York Court referred to Justice Cardozo's opinion in *Karlin* v. *Culkin*, 248 N.Y. pp. 471-472, where he reviewed New York's statutory law giving the Supreme Court power of control over lawyers and traced this power back to Sec. 27 of the 1777 New York's Constitution.

Similarly, in *Lathrop* (81 S. Ct. 1826), it was shown that the Wisconsin Supreme Court in setting up the integrated Bar of that state implemented a statute of the Legislature directing the Court so to do.

Also, in *Frankel*, 20 N.J. 588, 120 A.2d 603, cited in the Missouri opinion herein, Mr. Justice Brennan, then on the New Jersey Supreme Court, said in a dissenting opinion:

> "So it is that the people of New Jersey constitutionally cast upon this Court the power exclusively to determine the discipline to be imposed. Const. 1947, Art. VI, Sec. II, par. 3 * * *" (p. 611).

The text in pertinent part of this section of the Constitution is:

> "* * * The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted" (p. 1029, Rev. Sts. Cum. Supp. N.J. 1948, 1949, 1950).

In the light of the above, Respondent, p. 13, puts his finger upon one of the "basic elements" of Due Process which is lacking in this case in his quotation from Powell, and that is the requirement that there be "a legally competent tribunal having jurisdiction of the case". That the Court had no jurisdiction of the subject matter of the case cannot be waived, and may be raised any time before the final execution under the void judgment.

In the case of *State ex rel. Wulfing* v. *Mooney*, 362 Mo. 1128, 247 S.W.2d 722, the Court, *en Banc*, said (l.c. 724):

> "Jurisdiction of this court is limited by sections 3 and 4 of Article V of our Constitution. Section 3 gives this court exclusive appellate jurisdiction in certain cases, while under section 4 this court has original jurisdiction in remedial writs in exercising superintending control over inferior courts and tribunals."

"Original remedial writs" has a well known meaning in Missouri. It includes Habeas corpus, prohibition, mandamus, certiorari and quo warranto. It has never been supposed that disbarment procedures qualified under this classification.

For the reasons stated in the Petition and in this Reply Brief Petitioner respectfully submits the petition should be sustained and a Writ of Certiorari issued to the Supreme Court of Missouri and that upon a review the opinion of that Court should be ordered quashed.

Respectfully submitted,

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## APPENDIX.

The pertinent provisions of the Missouri Constitution, 1945, read as follows:

"§ 1. **Judicial power—constitutional courts**

Section 1. The judicial power of the state shall be vested in a supreme court, courts of appeals, circuit courts, probate courts, the St. Louis courts of criminal correction, the existing courts of common pleas, magistrates courts, and municipal corporation courts."

"§ 3. **Jurisdiction of the supreme court**

Section 3. The supreme court shall have exclusive appellate jurisdiction in all cases involving the construction of the Constitution of the United States or of this state, the validity of a treaty or statute of the United States, or any authority exercised under the laws of the United States, the construction of the revenue laws of this state, the title to any office under this state, the title to real estate, in all civil cases where the state or any county or other political subdivision of the state or any state officer as such is a party, in all cases of felony, in other classes of cases provided by law, and until otherwise provided by law, in all cases where the amount in dispute, exclusive of costs, exceeds the sum of seventy-five dollars."

"§ 4. **Superintending control of superior over inferior courts—original remedial writs**

Section 4. The supreme court, courts of appeals, and circuit courts shall have a general superintending control over all inferior courts and tribunals in their jurisdictions, and may issue and determine original remedial writs."

Article VI, §§ 2 and 3, Missouri Constitution, 1875, provide as follows:

"§ 2. **Supreme Court, jurisdiction of**

The Supreme Court, except in cases otherwise directed by this Constitution, shall have appellate jurisdiction only, which shall be co-extensive with the State, under the restrictions and limitations in this Constitution provided."

"§ 3. **Supreme Court, superintending control of—power to issue original writs**

The Supreme Court shall have a general superintending control over all inferior courts. It shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari and other original remedial writs, and to hear and determine the same."